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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 824

ADA J. VANT and WALTER J. VANT, Petitioners,

v.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Ada J. Vant and Walter J. Vant, petitioners, respectfully pray that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Third Circuit to review its judgment dated and entered December 31, 1958 (App. 2); and the Order denying Petition for Rehearing dated and entered February 16, 1959.

OPINIONS BELOW

The order of the United States District Court for the Western District of Pennsylvania, which was the subject of the appeal, was not accompanied by an opinion and the case is not reported. The opinion of the United States Court of Appeals for the Third Circuit is reported in 262 F. 2d 803, and is appended hereto (App. 1-2). The proceedings and appendices in the prior appeal on the same action were incorporated by reference. The order of the United States District Court for the Western District of Pennsylvania therein was not accompanied by an opinion and the case is not reported; and the opinion of the United States Court of Appeals for the Third Circuit in said prior appeal is reported in 255 F. 2d 263, and is appended hereto (App. 3-6).

JURISDICTION

The judgment sought to be reviewed (App. 2) was dated and entered December 31, 1958.

The Order of the Court of Appeals denying the Petition for Rehearing, which was not accompanied by an Opinion, was dated and entered February 16, 1959. Therefore, the expiration date for the filing of this petition for writ of certiorari is May 18, 1959.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., Section 1254(1); and the general supervisory power of this Court over lower Federal Courts.

QUESTIONS PRESENTED

1. When a District Court Order granting a Motion to Dismiss the Complaint has been affirmed by the Court of Appeals, and an Amendment to the Complaint which conforms to the Opinion of the Court of Appeals has been filed in the District Court, should not an unauthorized Motion of the defendant to strike the Amendment to the Complaint be denied and plaintiffs' Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure be granted if only for the reason that the defendant has failed to and waived the right to plead to or otherwise defend the Complaint as amended pursuant to said Rules; and does not the erroneous granting of such a motion to strike and the denial of such a motion for summary judgment conflict with the Law of the Land?

2. When, in the course of oral argument before the Court of Appeals on preliminary motions, it is stipulated that the case should stand submitted on the merits of the appeal as well as on the preliminary motions on condition that the court examine and consider the briefs and records of the prior appeal in the same action and that the appellants receive full consideration of their substantive and procedural points, which condition evidently was not complied with resulting in an erroneous affirmance, have not the appellants been illegally deprived of their right to due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States; and does not the judgment conflict with the Law of the Land?

3. When the Court of Appeals has affirmed a District Court Order granting an unauthorized, unprovided

for, insupportable Motion of defendant to strike the Amendment to the Complaint, after the defendant has waived its right under the Federal Rules of Civil Procedure to plead to or otherwise defend the Complaint as amended, has that Court not so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision?

CONSTITUTIONAL PROVISION INVOLVED

The provision of the Constitution of the United States involved herein is the Fifth Amendment, the pertinent portion of which (U.S.C.A., Constitution, Amendments 1 to 13, p. 172) is as follows:

"Amendment V. Due Process of Law . . . nor (shall any person) be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

In Cincinnati, Ohio, the late George H. Vant, decedent-insured, in 1920 made a written request of The Mutual Benefit Life Insurance Company, respondent-insurer, to deliver to his beneficiaries upon his death an Interest Income Certificate in the amount of $25,000.00. Upon Mr. Vant's death in 1931, the Interest Income Certificate was delivered to the petitioners herein, his widow, Ada J. Vant, and his son, Walter J. Vant, at Cincinnati, Ohio. Soon afterwards your petitioners moved to Pittsburgh, Pennsylvania, where they have resided for more than twenty years.

It is admitted that your petitioners are the sole owners of the Interest Income Certificate, which provides that Ada J. Vant receive the income therefrom for her life and Walter J. Vant (after January 1, 1943) receive the principal amount thereof upon her death.

After the petitioners had held the Interest Income Certificate for about twenty-five years, they agreed to merge their respective interests and obtain outright payment of the principal amount from the respondent. They were advised that they had the legal right to do so for any reason or for no reason at all; that the respondent was a mere depository, not a beneficiary of the decedent-insured, with no legal right whatever to object; and that the respondent had already made large profits on the income as well as exhorbitant capital gains on the principal, and that they themselves could and should have the benefit of such future profits and gains. Accordingly, they notified The Mutual Benefit Life Insurance Company of their agreement to merge their interests and requested outright payment of the principal amount, but their requests were repeatedly refused.

The action which followed was before the Court of Appeals in two different appeals, the first appeal at No. 12408 being reported in 255 F 2d 263 and the subsequent one at No. 12777 being reported in 262 F 2d 803.

The Proceeding in the Court of Appeals at No. 12408

The petitioners' suit was brought in the District Court at No. 15455, with jurisdiction based upon diversity of citizenship and an amount in excess of $3,000.00 exclusive of interest and costs (R. 2a). In the Complaint (R. 2a-5a) it was alleged, *inter alia,* that petitioners are the sole owners of the Interest Income Certificate (R. 6a-7a) which does not have imposed upon it any of the restrictions of a spendthrift or other trust pertaining to anticipation, attachment and invasion; that petitioners had agreed to merge their respective interests therein; and that the respondent arbitrarily and unlawfully refused to pay them upon demand.

There being no genuine issue as to any material fact, the case came on to be heard before District Judge Herbert P. Sorg on defendant's Motion to Dismiss Under Rule 12(b)(6) (R. 7a) and Plaintiff's Motion for Summary Judgment pursuant to Rule 56 (R. 8a). It was authoritatively argued before Judge Sorg that no matter which interpretation he might place upon the Interest Income Certificate (R. 6a-7a),—simple trust, chose in action, contract, *et cetera,*—he nevertheless had no legal alternative but to deny the motion to dismiss and to grant the motion for summary judgment. No applicable legal authority to the contrary was submitted. But Judge Sorg entered an Order (R. 8a), unaccompanied by an Opinion, in which he granted the motion to dismiss for the reason that the defendant is performing the contract of insurance in accordance with its terms. Obviously, Judge Sorg had overlooked or misapprehended the basis and purpose of the action because perform-

ance by the defendant is not in issue, the only issue being the right of the plaintiffs to agree as they did and obtain outright payment (R. 9a).

On appeal from said Order, the Court of Appeals (Kalodner, Staley and Hastie, Circuit Judges) affirmed (App. 6), but on a different ground, thus in effect reversing the decision of District Judge Sorg. In affirming, Circuit Judge Hastie opined (App. 3-6) that the Interest Income Certificate constituted a simple trust, the only citations by said jurist bearing on that point (App. 4-6). Although Judge Hastie was correct in interpreting the instrument as a simple trust, the only cases (a New York State case and an Indiana State case) which he erroneously considered on that point were not at all applicable, with the result that his conclusion was contrary to law. Judge Hastie even went so far as to state, "Whether or not Pennsylvania would adopt this view in an appropriate case we do not attempt to say" (App. 6); and, needless to say, the learned Judge likewise did not attempt to explain why this would not be an appropriate case. However, in order to make certain that Judge Hastie could give your petitioners full consideration, if he would, the unquestionably applicable Pennsylvania authorities were promptly submitted in the Petition for Rehearing which readily made it manifest that your petitioners had the legal right to waive the trust and obtain payment of their money divested of the trust. Nevertheless, on May 16, 1958, an Order, unaccompanied by an Opinion, was entered by Judge Hastie denying the Petition for Rehearing.

On May 20, 1958, promptly after the entry of said Order, there was filed on behalf of plaintiffs in the Dis-

trict Court an Amendment to the Complaint; and on May 27, 1958, a Motion to strike the amendment was filed, to which plaintiffs' Response was filed on May 29, 1958.

The day after the filing of said Amendment to the Complaint your petitioners had filed in the Court of Appeals a Motion for Leave to File Supplemental Appendix and Motion for Reconsideration in order to have the Amendment to the Complaint included in the record on appeal and to have the Court reconsider the appeal in the light of the amendment. Filed for the respondent was an Answer thereto, followed by a Reply to the Answer. The said motion showed that the amendment was properly filed in the only forum for establishing the record; that it was allowable as of course pursuant to Rule 15(a) of the Federal Rules of Civil Procedure; that it conformed to the Opinion of the Court of Appeals, which opinion made it *res judicata* that the issuance of the Interest Income Certificate created a simple trust whereby the defendant became a trustee of the $25,000.00 for the benefit of Ada J. Vant as life tenant and Walter J. Vant as remainderman; that by the amendment plaintiffs had specifically averred that they agreed to and did waive the trust and demanded payment divested of the trust; and that under the law they had the right to do so (In Re Henderson's Estate, 15 Phila. 598, 39 L.J. 450; Sharpless's Estate, Mendenhall's Appeal, 151 Pa. 214, citing with approval Yerkes's Appeal, 2 Chester Co. Reports 410, and followed in Owen's Estate, 15 Pa. Co. Ct. Reports, 196). The Answer thereto alleged, contrary to the law, that the amendment should not have been filed "without leave of court or written consent of defendant", when it is a matter of record that a responsive

pleading has never been filed; that it was untimely, when the record shows that it was filed one day after notice of the decision of the Court of Appeals; that it was not in conformity with the decision of the Court of Appeals, adding the likewise impertinent assertion that the Order of affirmance "contained no permission or suggestion of leave to file an Amended Complaint"; and that the amendment consisted of an erroneous conclusion of law that could not support the complaint, an untenable contention. The Reply to the Answer made it plain that the Answer was wholly without merit and that the motion was fully supported, leaving the Court of Appeals no legal alternative but to reverse with instructions that summary judgment be entered for plaintiffs.

On June 9, 1958, Judge Hastie for the Court of Appeals entered an Order, unaccompanied by an Opinion, that leave to file the supplemental appendix (Amendment to the Complaint) and the motion for reconsideration be granted; and that the motion for reconsideration be denied. Following this Order, on August 15, 1958, the mandate of the Court of Appeals was filed in the District Court, where the case proceeded before District Judge Sorg on September 3, 1958, on defendant's motion to strike the amendment and plaintiffs' response thereto.

The Proceedings in the Court of Appeals at No. 12,777

On October 9, 1958, District Judge Sorg entered an Order, unaccompanied by an Opinion, that plaintiffs' Amendment to the Complaint be stricken, with full knowledge on his part that it conformed to the Opinion of the Court of Appeals; that the Court of Appeals had ordered it to be included as part of the Record; that there is no provision in the Rules for such a motion to strike; and that the defendant had already waived its right under the Rules to plead or otherwise defend the amendment, leaving the jurist no legal alternative but to enter summary judgment for the plaintiffs.

From the said judgment your petitioners appealed, and the respondent presented in the Court of Appeals a Motion to Dismiss Appeal, Or, In The Alternative, To Assess Costs And Attorneys' Fees, in opposition to which was presented an Answer and Motion to Remand. The said motion to dismiss the appeal or, in the alternative, to assess costs and attorneys' fees was based upon respondent's insupportable and untenable proposition that "This appeal is without merit on its face and is frivolous and vexatious". Petitioners' Answer thereto showed that the appeal was wholly meritorious and that it was the respondent's motion which was frivolous and vexatious. The countering Motion to Remand should have been granted because it was apparent from the record that there was no genuine issue as to any material fact and summary judgment for plaintiffs should be ordered as a matter of law.

In the course of oral argument on said motions before the Court of Appeals (Biggs, Chief Judge; and

McLaughlin and Hastie, Circuit Judges), it became apparent that the merits of the appeal were being argued, the respondent admitting that the Order of Judge Sorg granting the motion to strike was an appealable order; further that the motion to dismiss the appeal, or, in the alternative, to assess costs and attorneys' fees must be denied as it subsequently was denied. Accordingly, it was stipulated in open court that the case should stand submitted on the merits of the appeal as well as on the preliminary motions, on the condition that the appellants receive full consideration of their substantive and procedural points and particularly a discussion of their said authorities cited in support of the substantive issue before the Court, which issue is the right of appellants to merge their respective interests in the Interest Income Certificate and to be paid the principal outright. The Court of Appeals denied the motions and affirmed the judgment (App. 2).

The Petition for Rehearing showed beyond question that the Circuit Judges overlooked or misapprehended the entire appeal, and yet that petition was denied in an Order, unaccompanied by an Opinion, entered by Judge Hastie. Then a Motion for Argument of Appeal on the Merits was presented in which your petitioners contended that the above mentioned condition attached to the oral stipulation made in open court relating to full consideration of the appeal was not complied with and as a result they in effect were denied their right of appeal. Furthermore, the said motion argued how discriminatory as well as erroneous was the judgment. Nevertheless, that motion was denied on March 11, 1959, in an Order, unaccompanied by an Opinion, entered by Judge Hastie. Hence, the instant petition.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Judgment Sought To Be Reviewed Conflicts With The Law Of The Land.

Without fear of contradiction, your petitioners contend not only that there is no legal authority for the prosecution of such a motion to strike as was granted by the District Court and sanctioned by the Court of Appeals, but also that there is no legal precedent therefor. The Federal Rules of Civil Procedure do not provide for such practice, and the Judges are bound by the Rules as by an Act of Congress. *Foltz v. Moore-McCormack Lines, Inc.*, 19 F. R. D. 301 (1956), (Cf. 28 U.S.C., sec. 2072).

Pursuant to the Rules, the only way the respondent could have pleaded to or otherwise defended the Amendment to the Complaint would have been by an Answer or by a Motion to Dismiss, the same as defending a Complaint. Because of the respondent's failure to have proceeded under the Rules, it has waived its right to do so. This is the Law of the Land, upheld in the various circuits including the Third Circuit, until the Third Circuit entered the instant conflict. *Van Sant v. American Express Co.*, 169 F. 2d 355 (C.C.A. 3, 1948).

Under Rule 7(a) respondent could have filed an Answer. Rule 8 provides the General Rules of Pleading, fully complied with by petitioners, and if respondent wanted to plead an affirmative defense, it should have been pleaded specially under Rule 8(c). Under Rule 12(a), a defendant shall serve his answer within 20 days after the service of the Complaint. Under Rule 12(b) every defense, in law or fact, to a claim for

relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that certain defenses may at the option of the pleader be made by motion. Under Rule 12(h) a party waives all defenses and objections which he does not present either by motion as hereinabove provided or, if he has made no motion, in his answer or reply. The respondent herein did not comply with any of the foregoing Rules, ignoring all of the applicable Rules. If the respondent thought that it could find support for such a motion to strike in Rule 12(f), then attention must be directed to the point that the motion does not contain any averment that the amendment contains scandalous matter, and further that the averments in the motion would justify a pleading only under Rule 8(c) or Rule 12(b) but then only under appropriate circumstances. Rule 12(f) provides only that the Court "may order *stricken from any pleading* any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" (Italics supplied). Of course, such was not the averred purpose of the defendant's Motion to strike.

It is respectfully submitted that in the instant action no pleading or defense to the Amendment to the Complaint is warranted. Pursuant to Rule 56, there being no genuine issue as to any material fact, summary judgment for plaintiffs should be granted as a matter of law. *S M S Mfg. Co. v. U. S.-Mengel Plywoods, Inc.*, 219 F. 2d 606 (C.C.A. 10, 1955), held that if it affirmatively appears from the record that there is no genuine issue as to any material fact, the case is appropriate for disposition by summary judgment, and it becomes the duty of the Court to enter such judgment under Rule 56. Actually, there are so many authorities in support

of the same point, the proposition should be considered elementary.

By its failure to plead under Rule 8(c), the respondent has waived every affirmative defense pursuant to Rule 12(h). *Van Sant v. American Express Co., supra,* is authority for the point that defenses by way of confession and avoidance must be pleaded under Rule 8(c), otherwise they are waived pursuant to Rule 12(h), and then are not allowable subsequently by amendment. Entirely applicable herein is the holding in *Black v. Shondell,* 174 F. 2d 567 (C.C.A. 8, 1949), that the defendant waived the defense that the petition did not state a claim upon which relief could be granted by failing to present that defense either by answer or by motion as required by Rule 12(b). Where the defense of lack of jurisdiction of the person is not raised by motion before answer or in the answer itself, the defense is waived by Rule 12(h), not because of the defendant's voluntary appearance, but because of his failure to assert the defense within the time prescribed by this rule. *Ginn v. Biddle,* 60 F. Supp. 530, E.D. Pa. (1945). Where it was stipulated that essential elements conferring general jurisdiction on District Court were present, and defendant corporation entered no plea or objection of improper venue, any right defendant corporation might have had to be sued in another district was waived. *Acadian Production Corp. v. Land,* 136 F. 2d 1 (C.C.A. 5, 1943). Subdivision (h) of Rule 12 intends that any defense permitted to be made by motion at option of defendant, and which is not raised either by motion or by answer, will be deemed to have been waived. *Phillips v. Baker,* 121 F. 2d 752 (C.C.A. 9, 1941), certiorari denied 314 U.S. 688.

2. The Judgment Sought To Be Reviewed Has Deprived Petitioners Discriminatorily Of Their Right To Due Process Of Law.

The Fifth Amendment to the Constitution of the United States guarantees petitioners that they shall not be deprived of their property without due process of law. The judgment to be reviewed (App. 2) has deprived your petitioners of property rights including, but not limited to, the following: (A) the right to outright payment of the principal amount of the Interest Income Certificate so that henceforth they will receive the benefit of all capital gains and the full income therefrom; (B) the right to litigate with due process of law to prevent the deprivation of said right; (C) their legal right to equal protection and application of the Federal Rules of Civil Procedure; and (D) their right to full consideration of the issues and legal points raised in their appeal.

A. Petitioners Have Been Deprived of the Right to Full Use and Enjoyment of their Interest Income Certificate.

After the filing of the Amendment to the Complaint and the Motion to strike it, there was no legal barrier to the entry of summary judgment for the plaintiffs. As a matter of fact and of law, there was no legal barrier thereto after the filing of the original Complaint. There is no point in arguing about District Judge Sorg's dismissal of the Complaint on his unsupported and insupportable Order, because it could only have meant that he would not let the plaintiffs win and he would not let the defendant lose. However, when that Order came before the Court of Appeals for review, Circuit Judge Hastie

correctly limited his discussion to the simple trust theory (App. 4-6). But in connection therewith, the jurist went overboard into New York State Court for an inapplicable case (App. 4) and then went out of bounds into Indiana State Court for another inapplicable case (App. 5), wondering "whether or not Pennsylvania would adopt this view" (App. 6). Therefore, the applicable Pennsylvania cases were promptly submitted in the Petition for Rehearing, informing Judge Hastie that Pennsylvania had adopted the view of appellants as early as 1882, and still maintains it. Why then, upon rehearing, did not Judge Hastie allow your petitioners their legal rights? Was Judge Hastie actually prejudiced, or simply indifferent? To make certain that there was full knowledge of the matter on Judge Hastie's part, the motion for reconsideration in the light of the Amendment to the Complaint was submitted, but to no avail. As a result, the only constructive and productive thing about Judge Hastie's Opinion (App. 3-6) is that it settled the interpretation of the Interest Income Certificate as a simple trust. Even this was enough to encourage petitioners about the further proceedings before District Judge Sorg on the Amendment to the Complaint, because (1) it was *res judicata* by the Court of Appeals that the applicable theory was the simple trust, (2) the Court of Appeals had ordered the amendment included as part of the Record, (3) the amendment conformed to the Opinion of the Court of Appeals, and (4) the Complaint, as amended, was patently sufficient and legally supported. Why then did Judge Sorg grant the motion to strike? Any Judge who would enter such an Order, can be expected to make any departure from the accepted and usual course of judicial proceedings. No

wonder his Order was not accompanied by an Opinion —again.

B. Petitioners Have Been Deprived of their Right to a Day in Court.

It is obvious that petitioners have not been allowed their right to be heard in advance of judgment, as contemplated by the Rules and applicable law, as well as by the Constitution. With due process of law, they would have obtained judgment.

C. Petitioners Were Denied Equal Protection of the Federal Rules.

It is well settled under the Rules that by its failure to serve as Answer or a Motion to Dismiss within 20 days after the filing of the Amendment to the Complaint, the respondent waived its right to do so. It is just as well settled that by its motion to strike, the respondent did not legally defend the amendment, the motion being a nullity. Therefore, it was discriminatory for District Judge Sorg to misapply the Rules and fail to enter summary judgment for plaintiffs and likewise for the Court of Appeals to have sanctioned the action.

D. Petitioners Were Denied Judicial Consideration and Review of their Cause.

District Judge Sorg's failure to file legal Opinions with his Orders makes it evident that he denied petitioners judicial consideration. The jurist has a right to be wrong; but he has a concomitant duty to be sincere. Therefore, regardless of whether his conclusions are erroneous or legal, to keep above suspicion the jurist is obliged to enter Opinions which make it plain that he

has at least considered all points and discussed all authorities, including those submitted by the losing parties. Otherwise, there is justification for exercise of the right to criticize. In disposing of the proceedings below as was done by District Judge Sorg and by Circuit Judge Hastie and his associates, Canons of Judicial Ethics were violated, their being a grave doubt about their having violated Canon 1, Relations of the Judiciary; Canon 2, The Public Interest; Canon 3, Constitutional Obligations; Canon 5, Essential Conduct; Canon 6, Industry; Canon 14, Independence; Canon 19, Judicial Opinions; Canon 20, Influence of Decisions Upon the Development of the Law; Canon 22, Review; and Canon 34, Summary of Judicial Obligation.

On appeal, your petitioners had the same problem again with Circuit Judge Hastie and his associates. Their opinion (App. 1-2) did not cite a single case. They simply brushed off the appeal through stating "The district court was correct in its interpretation of the meaning and effect of our decision on the first appeal" (App. 2), a most impertinent observation, because the issues on the two appeals were quite different. What is more serious, it is apparent in their Opinion that after the case was argued before them on two appeals, they still do not know what the issues are. No wonder that citizens become discouraged with expending time, effort and money in litigation, and then disgusted with the unjust results,—proclaiming "There is no justice!" Judging from their Opinion (App. 2), the Circuit Judges erroneously think that your petitioners wanted "equitable intervention overriding the arrangement made by the insured with the insurance Company for the deferment of payment of the proceeds of the insurance policy".

(App. 2). This positively is not the case. **The arrangements made by the insured with the insurance company have never been a subject for consideration in the proceedings below, because the insurance contracts went out of existence upon the death of the insured at which time a new and separate thing came into existence—the Interest Income Certificate.** They even based their adjudication on the false premise that appellants have not alleged a theory of trust (App. 2), when that is specifically averred in the Amendment to the Complaint which they ordered included in the Record and which was the primary substance of the appeal.

In the first appeal, the issue was substantive, involving the right of petitioners to waive the simple trust created thereby and obtain outright payment of the principal amount. *In the second appeal,* the issues were procedural, involving denials of due process of law. Although petitioners have argued that they were denied full consideration of the issues and legal points raised in their appeal, they actually did not receive any consideration. The best evidence of this enlarged contention is the Opinion (App. 1-2) of the court of "appeals".

3. The Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings, And So Far Sanctioned Such A Departure By The District Court, As To Call For An Exercise Of This Court's Power Of Supervision.

This consideration governing review on certiorari is set forth in paragraph 1(b) of Rule 19 of the Rules of this Honorable Court. Furthermore, this Court has held that Courts of Appeals have supervisory control and should exercise it, in the case of *La Buy, United States*

District Judge, v. Howes Leather Co., Inc., et al., 352 U. S. 249, affirming 226 F. 2d 703 (C.C.A. 7, 1957). Mr. Justice Clark stated in the majority opinion (pp. 259-260) that, "Supervisory Control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the Federal system".

The record herein is replete with such incredible departures by the District Court, sanctioned by the Court of Appeals.

Why was District Judge Sorg so anxious to deny petitioners their rights herein that be ordered the Amendment to the Complaint stricken after the Court of Appeals had ordered it included in the Record?

Why were Circuit Judge Hastie and his associates so anxious to sanction Judge Sorg's said denials that they sanctioned his overruling their said order?

CONCLUSION

In view of the foregoing, particularly the willingness of the Court of Appeals to permit the District Court to reverse it on the issue of whether the amendment be part of the record, this Honorable Court should be alerted to the need for judicial review and grant this petition for writ of certiorari.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioners.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,777

ADA J. VANT AND WALTER J. VANT,
Appellants
v.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, A CORPORATION.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued December 15, 1958

Before: BIGGS, *Chief Judge;* and MCLAUGHLIN and HASTIE, *Circuit Judges.*

Opinion of the Court

(Filed December 31, 1958)

PER CURIAM.

When this matter came before us for hearing on appellee's motion to dismiss the appeal and the countering motion of appellants to remand with instructions, it became apparent that counsel for both parties were addressing themselves, in substantial part at least, to the merits of the issue presented by the appeal. Accordingly, it was stipulated in open court that at the conclusion of argument the case should stand submitted on the merits of the appeal as well as on the motions. In this connection counsel for appellant strongly urged the relevancy of briefs and records on the prior appeal on this

case. Vant v. Mutual Benefit Life Ins. Co., 1958, 255 F.2d 263. We have examined and considered these items.

This litigation is an effort of a widow and her son, beneficiaries of a policy of insurance on the life of their deceased husband and father, to obtain immediate payment of the entire proceeds of this life insurance policy, although the policy itself expressly provided for the payment of interest on the principal sum to the widow during her lifetime and the entire proceeds to the son on her death. Originally, the case was submitted in the trial court on the plaintiffs' motion for summary judgment and defendant's motion to dismiss. Final judgment was entered dismissing the complaint. On appeal we affirmed.

After our remand to the district court the plaintiffs filed an amendment to their original complaint alleging in substance that the defendant is in legal contemplation a trustee of the fund in controversy for the plaintiffs. This theory was not spelled out in the original complaint. Believing that our appellate ruling required the same result whether the complaint presented a contractual or a trust theory of liability, the district court, on motion, struck this amendment. This appeal followed.

The district court was correct in its interpretation of the meaning and effect of our decision on the first appeal. It was and is our view that appellants have not alleged or shown justification, whether on a theory of trust or otherwise, for equitable intervention overriding the arrangement made by the insured with the insurance company for the deferment of payment of the proceeds of the insurance policy.

The motions will be denied and the judgment will be affirmed.

(Same Caption)

Opinion at No. 12,408

Argued March 21, 1958

Before KALODNER, STALEY and HASTIE, Circuit Judges

Opinion filed April 30, 1958.

HASTIE, Circuit Judge.

On March 23, 1920, the late George H. Vant amended the settlement provision of his application to the defendant for insurance in the amount of $25,000 on his life. In accordance with that amendment, policies were issued to provide in relevant part that on the death of the insured, the defendant would hold the proceeds, pay the widow interest at 3% per year for life, and upon her death pay the son interest at the same rate until January 1, 1943, and then pay the son the entire amount of the proceeds. The application directed that "the right of the withdrawal is to be withheld from my said Wife during her lifetime, and is also to be withheld from my said Son until January 1, 1943."

When the insured died, the defendant issued a $25,000 "interest income certificate" wherein it formally undertook to make payments to the widow and son in accordance with the terms of the policy. After January 1, 1943, the widow and son, both living, contracted to "merge their interests" for the purpose of receiving the proceeds immediately and outright. The defendant refused to pay other than by the terms of the insurance agreement. Thereupon, the widow and son brought this action, basing jurisdiction on diversity of citizenship, seeking to compel a present lump sum payment. The defendant moved to dismiss under Fed.Rules Civ.Proc. Rule 12(b) (6), 28 U.S.C., for failure to state a claim

upon which relief can be granted, and the plaintiffs moved for summary judgment under Rule 56. The plaintiffs' motion was denied, the defendant's motion was granted, and accordingly the district court ordered the action dismissed. This appeal by the plaintiffs followed.

The plaintiffs attempt to effect a nullification of the method of disposition of the proceeds as formulated by the deceased and incorporated in the insurance contract. There is some dispute whether an insurance company in this situation can be considered as a trustee so as to permit a court of equity to direct an anticipation of the agreed distribution. See the opinions in Re Nires, 1943, 290 N.Y. 78, 48 N.E.2d 268, 145 A.L.R. 1368; and see the comprehensive review and analysis in 1 Scott, Trusts, 2d ed. 1956, § 87.1. Even assuming the power to exist, the court will exercise it only in rare instances.

> "The court will not, however, authorize or direct the trustees to apply for the support of the beneficiary income which by the terms of the trust it was validly provided should be accumulated for him, or to apply principal for his support when such use of the principal is not authorized by the terms of the trust, unless the needs of the beneficiary are such as to require a deviation from the terms of the trust." See 2 Scott, Trusts, 2d ed. 1956, § 168 at 1187; Restatement, Trusts, §§ 167, 168.

These authorities make it clear that the court is but undertaking to do what it thinks the deceased would have provided had he anticipated the eventualities which occurred. If the trust was set up to provide for needs of the beneficiary, and circumstances have changed to such a degree as to make the trust ineffective to secure

that purpose, courts have deviated from express terms to accomplish the basic general purpose of the instrument. As long as the circumstances remained unchanged, however, it must be assumed that the deceased contracted to frustrate demands for payment sooner than he had provided. Interference by a court in this situation would have no equitable basis. It might well be viewed as a merely arbitrary interference with liberty of contract.

In this case, the insured chose one of a variety of permissible methods of disposing of the proceeds of his insurance policy. The plan he formulated is now in effect. The plaintiffs neither alleged nor indicated that they would attempt to prove any change of circumstances other than the agreement of the beneficiaries to merge their interests and demand immediate payment. To the contrary, by moving for summary judgment they have conceded that the only issue in the case is whether this agreement alone is sufficient reason to require the insurer to pay the beneficiaries sooner than the insured wanted and directed that they be paid. Elliott v. Travelers Ins. Co., 1951, 121 Ind. App. 400, 99 N.E.2d 274, discussed and approved in 1 Scott at page 674, is nearly directly on point. There the deceased left the proceeds of his life policy with the insurance company to pay 3½% interest per year to one appellant for life, and at death to pay the corpus to the other appellants. The appellants agreed to receive the payment immediately, claiming that the cost of living had increased so much as to make the "trust" moribund. The court denied the appellants' claim on the ground that the intent of the deceased, far from being disregarded, was being precisely followed. As Scott observes: "[I]n the absence of any exigency

there is no reason for deviating from the arrangement made by the insured with the company."

We are aware that the view propounded by Professor Scott—that under the proper circumstances, the court will treat the insurance company in the same way as a trustee—has been influential to the extent that it has been introduced into the Restatement of Trusts. See, § 12, comment gg (1948 Supp.) and comments thereto. Whether or not Pennsylvania would adopt this view in an appropriate case we do not attempt to say. For the present complaint and the motions upon which the case was submitted for final decision present for adjudication merely the question whether two beneficiaries can at their pleasure so "merge their interests" as to receive immediately and in full that distribution of proceeds which under the insurance contract was to be deferred. This we hold they cannot do.

The judgment will be affirmed.